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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION, PETITIONER

v.

CONWAY CORPORATION, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR ARKANSAS POWER & LIGHT COMPANY

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BRIEF FOR ARKANSAS POWER & LIGHT COMPANY

OPINIONS BELOW

The opinion of the court below is that of the United States Court of Appeals for the District of Columbia Circuit in *Conway Corporation* v. *Federal Power Commission* (Petition, App. A)[1], on an appeal of Conway Corporation, *et al.*, for review of orders of the Federal Power Commission in Docket Nos. E-8250, *et al.*, dated July 31, 1973 (Petition, App. C), October 29, 1973 (Petition, App. D), and December 5, 1973 (Petition, App. E).

[1] "Petition, App." refers to the appendices to the Federal Power Commission's petition for a writ of certiorari.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the court of appeals was founded on Section 313(b) of the Federal Power Act, 16 U.S.C.825*l*(b).

The judgment below was entered April 4, 1975 and is reported at 510 F.2d 1264 (D.C. Cir. 1975). On November 11, 1975, the Supreme Court granted the petition for a writ of certiorari of the Petitioner in *Federal Power Commission* v. *Conway Corporation, et al.*, No. 75-342.

QUESTION PRESENTED FOR REVIEW

Whether the court of appeals erred by holding that the Federal Power Commission has the statutory authority to adjudicate allegations of discrimination between the rates for jurisdictional wholesale sales of electricity and retail sales of electricity, which are not subject to the Commission's rate reviewing power?

STATUTES INVOLVED

Relevant sections from the statutes involved are printed in the appendix to this brief. They are:

Sections 201, 205, and 206 of the Federal Power Act, 16 U.S.C. §§824, 824d, 824e;

Sections 1(b) and 5(a) of the Natural Gas Act, 15 U.S.C. §§717(b) and 717d(a).

STATEMENT OF THE CASE

1. Arkansas Power & Light Company

Arkansas Power & Light Company (AP&L or Company) owns and operates an integrated electric power production, transmission and distribution system in 62 counties of the state of Arkansas, supplying power and energy at retail and wholesale to various customers. Included among the Company's wholesale customers, which purchase power and energy from AP&L and then resell it to customers of their own, are the respondents, Conway Corporation, *et al.* (Conway).[2]

AP&L is a "public utility" within the meaning of §201(e) of the Federal Power Act (Act), 16 U.S.C. §824(e), since the provisions of the Act apply to the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce. As a jurisdictional public utility, AP&L must submit any changes which it proposes in its interstate wholesale rates to the Federal Power Commission (Commission) for approval, and this Commission has exclusive rate reviewing authority over such rates. The rates at which AP&L sells electric power and energy to its retail customers in Arkansas are subject only to the jurisdiction of the Arkansas Public Service Commission.[3]

---

[2]The following municipalities and rural electric cooperatives, which are wholesale customers of AP&L, are the respondents in this proceeding and are collectively referred to as "Conway": Conway Corporation (Conway, Arkansas); Benton Municipal Light and Water Works; Hope Water & Light Commission; City of North Little Rock; City of Osceola; City of Prescott; City of West Memphis; Farmers Electric Cooperative Corporation; and Mississippi County Electric Cooperative.

[3]The rates at which municipalities in Arkansas sell electric power and energy to their own retail customers are not regulated, either by the Federal Power Commission or the Arkansas Public Service Commission.

2. The Federal Power Commission Proceedings Involved

On June 1, 1973, AP&L filed with the Commission an application for increase in wholesale rates pursuant to §205(d) of the Federal Power Act, 16 U.S.C. §824d(d). In that filing, the Company showed that for the twelve months ended July 31, 1972, AP&L had earned a rate of return of 4.75% on the rate base allocated to its municipally owned wholesale customers, and a rate of return of 1.79% on the rate base allocated to its rural electric cooperative wholesale customers. Thereafter, on June 28, 1973, Conway sought intervention and urged the Commission to reject AP&L's proposed increase by asserting among other things that:

> Insofar as petitioners can ascertain, the sole reason which AP&L has for filing this unilateral rate increase is an attempt to squeeze petitioners or some of them out of competition, and to make them more susceptible to the persistent attempts of the company to take over the publically [sic] owned systems in the State.
>
> • • • • •
>
> By this filing, AP&L seeks to force an end to the pre-existing competitive situation. While it here seeks to impose rate increases of 22.6% upon the cities and 34.9% upon the coops,[4] it has indicated no intent of filing to change its own longstanding industrial rates.[5] As will be shown, the proposed rates here are such that it would be impossible for petitioners to sell power to an industrial load of any size at a competitive price with AP&L, since, in many cases, the revenues therefrom would not even cover the incremental power costs to petitioners.
>
> • • • • •
>
> . . . [AP&L's] filing should be rejected as a result of the obvious price squeeze which AP&L has sought to impose without cost basis therefore.
>
> • • • • •
>
> . . . [S]ince the company has filed a plainly discriminatory rate against the single class of customer which it has historically attempted to drive out of business, without justification on any necessary cost of service basis, the filing should be rejected out of hand . . . . (Footnotes added)

AP&L responded to Conway's protest stating that the proposed increase was designed strictly to achieve a satisfactory return on its wholesale business and denying categorically that the Company had attempted or was then attempting to squeeze its wholesale customers out of competition.[6] AP&L further stated that the proposed

[4]In its response, the Company pointed out that the actual percentage increases to the municipalities and cooperatives would be 19.4% and 27.2% respectively, assuming that the rate increase was granted in its entirety. Further, as the Commission correctly pointed out in *Metropolitan Edison Co.*, 46 F.P.C. 563, 564 (1971), "[i]t is the increased rate not the increase-in-rate which must be tested to determine its justness and reasonableness."

[5]On March 18, 1974, AP&L filed with the Arkansas Public Service Commission an application to increase the rates applicable to its retail customers, which would increase industrial rates by 22.6% if granted in its entirety.

[6]It is important to note that AP&L has not, in fact, engaged in any anticompetitive activity and, in particular, has never attempted to "squeeze" its wholesale customers out of business. Contrary to the court's implication (Petition, App. A, p. 3a), the rate filing being contested in this proceeding did not raise AP&L's wholesale rates above or even to the level of its retail rates. That the Company has not engaged in any anticompetitive activity is further supported by the following excerpt from the U.S. Department of Justice, Antitrust Division, letter of December 12, 1971, to the then Atomic Energy Commission in connection with the Company's application to construct a nuclear power plant. As the Department of Justice stated:

> [AP&L] presently has dominance in electric bulk supply and transmission in a major portion of Arkansas. But *we have found no evidence that [AP&L] has exercised that control to the detriment of competition.* (36 Fed. Reg. 25240, December 30, 1971) (Emphasis supplied)

increase in wholesale rates would not prevent Conway from competing for industrial loads with AP&L. On July 31, 1973, the Commission issued an order which accepted the proposed rate schedules for filing, suspended the proposed rates for the maximum statutory period and permitted them to go into effect on January 1, 1974, subject to refund, and set the matter for hearing to determine the justness and reasonableness of the proposed rates (Petition, App. C). The Commission granted Conway's petition to intervene but refused to allow Conway to introduce evidence of the alleged "price squeeze" since Conway had not demonstrated that the Commission had the authority to direct relief even if the allegation were true. The Commission further stated that Conway had the right to file an amended petition setting forth the requested relief which was within the Commission's authority to direct.

In response, Conway filed an amended petition which requested the Commission "to reduce the proposed [wholesale] rates filed by AP&L to eliminate the [alleged] anticompetitive price squeeze, within its authority under Sections 205 and 206." On October 29, 1973 the Commission again concluded that the relief sought was beyond its jurisdiction (Petition, App. D). The Commission reasoned:

> The relief sought by Petitioners is beyond the authority granted to us under the Federal Power Act. Under the Federal Power Act this Commission is charged with the responsibility for reviewing rate applications to insure that the rates proposed are just and reasonable. [AP&L] has submitted its full evidentiary presentation including a cost of service as well as testimony and exhibits of their witnesses which they state support the subject wholesale rate increase. That evidence, including [AP&L's] allocation of its costs to its wholesale service, is, of course, subject to review and cross-examination by all parties

> including the intervenors and also of course subject to review and decision thereon by the Presiding Trial Judge assigned to the case as well as the Commission itself.
>
> Wholesale rates must recover allocated wholesale costs. Customers' suggested relief is a rate related not to wholesale costs but rather related to [AP&L's] industrial rates. However, [AP&L's] industrial rate level and the accounting and rate making principles underlying that rate level is under the sole jurisdiction of the state commission and not the Federal Power Commission. We have no jurisdiction over [AP&L's] industrial rates, and we do not choose to open this hearing to examination of those rates. Such an action would require a detailed analysis of [AP&L's] retail cost of service and would result in this Commission interjecting itself into an area in which it has no jurisdiction.
>
> Petitioners' allegation of 'price squeeze' in and of itself, does not constitute anticompetitive behavior by [AP&L] given the fact that any wholesale rates we approve must be based on allocated wholesale costs. To approve rates which recover less than those costs would produce grave consequences, since such action would be tantamount to imposing confiscatory rates on [AP&L] and possible subsidization of [AP&L's] wholesale service by [AP&L's] industrial customers or other retail customers of [AP&L] over whom we have no jurisdiction. Moreover, Petitioners' proposal would subordinate our authority to set wholesale rates to the retail ratemaking jurisdiction of the state commission. (Petition, App. D, pp. 37a-38a)

Conway's petition for rehearing of this order was denied by the Commission on December 5, 1973 (Petition, App. E).

3. Opinion of the Court of Appeals

Conway petitioned the Court of Appeals for the District of Columbia Circuit to review the Commission's orders of July 31, 1973, October 29, 1973, and December 5, 1973.

Upon review, the court of appeals rejected the Commission's position that it lacked the necessary jurisdiction to adjudicate an allegation of a "price squeeze" between jurisdictional wholesale rates and nonjurisdictional retail rates and remanded the case for further proceedings.

Although the court recognized that the Commission's wholesale ratemaking jurisdiction was narrowly defined under §205(b) to ensure that the Commission would never interfere with the exclusive right of a state regulatory agency to set rates for retail sales of electricity within its state boundaries, the court, nevertheless, held that §205(d) authorizes the Commission to remedy a proven price squeeze between a rate subject to its jurisdiction and a rate not subject to its jurisdiction. The court reasoned that the language of §205(b) was only intended to mean that the Commission was required to address its sanction to the jurisdictional wholesale rate. The court gave predominant weight to an assumption that if the draftsmen of the Act had not intended to give the Commission jurisdiction over a cross-jurisdictional price squeeze, they could have done so by prohibiting "the maintenance of unreasonable differences in rates 'between classes of service subject to the jurisdiction of the Commission.' " (Petition, App. A, p. 15a) The court supported its statutory interpretation primarily by reference to this Court's prior decisions in *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 324 U.S. 635 (1945), and *Gulf States Utilities Co.* v. *F.P.C.*, 411 U.S. 747 (1973).

SUMMARY OF ARGUMENT

The court below, while accepting the fact that the Commission has no authority to review or modify AP&L's state regulated electric retail rates, found that those provisions of the Federal Power Act vesting the Commission with authority to regulate interstate wholesale rates also contain the implicit duty to adjudicate an allegation of a price squeeze between AP&L's interstate wholesale rates and its state regulated retail rates. No such duty can be inferred from the statutory language of the Federal Power Act, or from its legislative history. The Act was narrowly drawn to protect state regulated electric retail rates from modification by federal authority notwithstanding allegations that the retail rate may have been set well above or below the level which would be deemed just and reasonable by the Federal Power Commission under federal ratemaking principles and concepts.

The court's decision would require the Commission to act contrary to its ratemaking responsibility to set wholesale rates on the basis of wholesale costs without regard to retail rate levels. This responsibility emanates from the letter and intent of the Federal Power Act and has been followed without deviation by the Federal Power Commission since its inception. Moreover, the decisions of this Court upon which the court below purported to support its aberrant statutory construction are clearly unpersuasive. Accordingly, AP&L submits that there is simply no rational basis for overturning the Commission's own interpretation of its limited statutory mandate in the ratemaking area.

ARGUMENT

I. THE COMMISSION HAS NO AUTHORITY UNDER THE FEDERAL POWER ACT TO ADJUDICATE A CLAIM OF DISCRIMINATION BETWEEN A JURISDICTIONAL WHOLESALE RATE AND A NONJURISDICTIONAL RETAIL RATE.

The court below held that the Commission has jurisdiction to remedy alleged discrimination between jurisdictional wholesale rates and nonjurisdictional retail rates. AP&L submits that the language of §§205 and 206 of the Act, the pertinent legislative history and the Commission's consistent interpretation of its authority [7] clearly demonstrate that the court of appeals committed reversible error.

A. Under §§205(b) and 206(a), the Commission's authority to review and modify rates is limited to interstate wholesale rates.

Section 205(b) of the Federal Power Act prohibits any public utility "with respect to any transmission or sale subject to the jurisdiction of the Commission" from maintaining "any unreasonable difference in rates, charges, services, facilities, or in any other respect, either as between localities or as between classes of service." Section 206(a) requires the Commission to determine a just and reasonable rate whenever it, after a hearing, has found that the rate demanded "by any public utility for

[7] *Alabama Electric Coop.* v. *Alabama Power Co.*, 38 F.P.C. 962 (1967); *St. Michaels Utilities Comm'n* v. *Eastern Shore Public Service Co.*, 35 F.P.C. 591 (1966), *petition to review denied sub nom St. Michaels Utilities Comm'n* v. *F.P.C.*, 377 F.2d 912 (4th Cir. 1967); *Southwestern Public Service Co.*, 33 F.P.C. 343 (1965); *Jaspan* v. *Philadelphia Electric Co.*, 1 F.P.C. 561 (1938).

any transmission or sale *subject to the jurisdiction of the Commission*. . . is unjust, unreasonable, unduly discriminatory or preferential."[8] (Emphasis added)

Under these sections, the Commission's authority to review and modify electric rates is clearly limited by the words "subject to the jurisdiction of the Commission." The Act's declaration of policy states in §201(a) that ". . . Federal regulation of . . . the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." (16 U.S.C. §824(a)) Furthermore, §201(b) states that "[t]he provisions of this Part shall apply to the . . . sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy . . . ." (16 U.S.C. §824(b)) Thus, by

[8] Section 205(b) provides in full:

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities or in any other respect, either as between localities or as between classes of service. (16 U.S.C. §824d(b))

Section 206(a) provides in full:

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. (16 U.S.C.§824e(a))

referencing §§205(b) and 206(a) to the Act's declaration of policy the draftsmen provided a safeguard against the possibility that the Commission would usurp state authority to approve rates for retail sales of electricity on the ground that it was necessary to eradicate rate discrimination occurring across the jurisdictional line of demarcation.

Pertinent portions of the legislative history preceding passage of the Act confirm beyond all doubt that its draftsmen and sponsors intended to insulate state regulated electric retail rates from modification by the Federal Power Commission and that wholesale rates were to be determined without regard to retail rates. The following dialogue between Representative Pettengill of the House Committee on Interstate and Foreign Commerce and Mr. Dozier Devane, one of the draftsmen of the 1935 Federal Power Act, occurred during the Committee hearings on the Act:[9]

> Mr. Pettengill: You say this bill gives the Power Commission jurisdiction over wholesale energy in interstate transmission.
>
> Mr. Devane: Yes.
>
> Mr. Pettengill: Suppose the retail rate or wholesale rates in intrastate are fixed by the State Commission, and were so low that for the company to exist it had to charge exhorbitant rates for its wholesale interstate business. Then would not the doctrine of the Shreveport case[10] apply?

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[9]Hearings before the House Interstate and Foreign Commerce Committee on H.R. 5423, 74th Cong., 1st Sess., March 8, 1935, p. 503.

[10]*Houston, East and West Texas Ry.* v. *United States*, 234 U.S. 342 (1914).

> Mr. Devane: No Sir.
>
> • • • • •
>
> Mr. Devane: The interstate rate should be determined upon its reasonableness, its reasonableness without regard to what the intrastate rate is.
>
> Mr. Pettengill: That is what it should be.
>
> Mr. Devane: And the intrastate rate should be determined upon its reasonableness.

Similarly, Representative Cole, one of the sponsors of the statute in its final form, commented on the House floor as to the assiduous efforts of the Committee to separate the Commission's interstate wholesale ratemaking authority from the retail ratemaking authority of the state commission:

> As to the jurisdiction of the States and State commissions, I doubt if any State commission or State officials familiar with the bill as it is now before you will say that the jurisdiction of the States has not been safeguarded and protected in a fair and lawful way. In doing so we have tried—and I think successfully—to avoid the injection into the Federal control, which this title confers, the extension thereof into intrastate activities in the way that the Shreveport case might permit. (79 Cong. Rec. 10384, June 28, 1935).

B. The decision below is premised on an illogical interpretation of §§205(b) and 206(a).

Despite the Federal Power Act's unambiguous statutory language and legislative history, the court of appeals concluded that a "common sense reading of the statutory language reveals no requirement that both rates involved in a pattern of discrimination [subject to the Commission's remedial powers under §§205(b) and 206(a)] fall

within the jurisdiction of the Commission." This conclusion is premised on the erroneous assumption that if Congress had intended to limit the reach of §205(b) to discrimination between jurisdictional classes, it would have referred to "classes of service subject to the jurisdiction of the Commission" instead of "classes of service." (Petition, App. A, p. 15a)

Following the court's logic, Congress would have had to have written §205(b) as follows:

> No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, . . . maintain any unreasonable difference in rates . . . between classes of service *subject to the jurisdiction of the Commission*. (Emphasized language added)

The additional "subject to" phrase at the end of the section would obviously be redundant, however, since §205(b) already limits the Commission's jurisdiction "to any transmission or sale subject to the jurisdiction of the Commission."[11] In seeking to justify its conclusion, the court stated that "[a] fair interpretation of the statute as it is drafted is . . . that any sanction imposed by the FPC to remedy an anticompetitive practice is to be addressed to the jurisdictional rate . . ." (Petition, App. A, p. 16a) The court has, in other words, inferred from the absence of a "subject to" phrase at the end of the section that Congress was requiring the Commission to remedy

[11]At one point in the Committee hearings, Mr. Devane remarked in reference to certain amendments, proposed by the National Association of Railroad and Public Utility Commissioners, to the draft then being considered, "[w]here they propose to put in every paragraph 'subject to the jurisdiction of the Commission,' that is pure draftsmanship. That does not make any difference, if you want to do that. They want to amend every paragraph and every section, and every subsection, by the use of those words." Hearings before the House Interstate and Foreign Commerce Committee on H.R. 5423, 74th Cong., 1st Sess., 1935, p. 2143.

unreasonable differences between rates subject to its jurisdiction and rates not subject to its jurisdiction and, at the same time, requiring that the sanction always be addressed to the jurisdictional rate.[12]

Since Congress did not give the Federal Power Commission authority to modify state regulated retail rates, the inevitable result which flows from the court of appeals' decision is that in some cases the Commission would be required to subordinate its statutory authority to regulate interstate wholesale rates to the authority of other regulatory commissions. The court would, in effect, have the Commission attempt to eradicate an alleged price squeeze between wholesale rates and retail rates by simply lowering the wholesale rate below the point found necessary under the guidelines established pursuant to the Federal Power Act and this Court in *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944).

As this Court has said with regard to the Natural Gas Act, also administered by the Federal Power Commission, "a regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law." *U.G.I.* v. *Continental Oil Co.*, 381 U.S. 392, 400 (1965). More recently, in *Corporation Comm'n* v. *F.P.C.*, 415 U.S. 961 (1974), the

[12]It should be emphasized that a mere difference in rates between different classes of service is not *per se* discriminatory, since customer classes with different load characteristics are obviously not entitled to equivalent rates. *St. Michaels Utilities Comm'n* v. *F.P.C.* 377 F.2d 912, 915 (4th Cir. 1967). Similarly, under the Robinson-Patman Act, for example, price "differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which commodities are to such purchasers sold or delivered" are not prohibited, 15 U.S.C. §13.

Court affirmed a ruling of the United States District Court for the Western District of Oklahoma that the setting of a statewide minimum price for wellhead gas by the state commission conflicted with the jurisdiction of the Federal Power Commission under the Natural Gas Act and that the federal authority vested in the Commission over wholesale rates for natural gas governed under the supremacy clause of the Constitution.

Moreover, the court's opinion greatly oversimplifies the problems that would confront both the Commission and interstate electric companies if the Commission were charged with the responsibility of resolving asserted price squeezes arising from differences in wholesale and retail rates. If, in fact, there was a price squeeze of the type alleged by Conway in the Commission proceedings below, based on asserted differences between AP&L's wholesale rates and its retail industrial rates and the customers alleged inability to match AP&L's retail industrial rates, such a differential could be created in several ways through the interaction of three different rates: (1) the electric company's interstate wholesale rate; (2) the electric company's retail industrial rate; and (3) the retail rate designs of the electric company's wholesale customers. Since only the first of these three rates is subject to the jurisdiction of the Commission, the customers may independently create a price squeeze, either inadvertently or intentionally, through the levels and design of their own retail rates (especially their industrial rates). This is particularly apparent in the case of the municipal wholesale customers, whose rates to its customers are not regulated by the Federal Power Commission, the Arkansas Public Service Commission, or any other outside regulatory agency.

Furthermore, the ratemaking principles adopted by the Federal Power Commission may vary substantially from those utilized by the state commissions, and no two jurisdictions are going to have identical objectives or policies with regard to regulation.[13] Conflicts in policy in ratemaking procedures can, and have arisen, over methods of determining rate base, allocation of costs, items of expense to be allowed or disallowed, accounting methods and other matters. (See *Arkansas Power & Light Co.* v. *F.P.C.*, 185 F.2d 751 (1950), *cert. denied*, 341 U.S. 909 (1951).

Since Congress did not give the Federal Power Commission authority to modify state regulated retail rates, or the retail rates of the wholesale customers, AP&L submits that the rates established by one jurisdiction cannot be used in determining the appropriate level of rates in the other. The determination of the justness and reasonableness of the wholesale rates of a public utility is to be made by the Commission, applying the provisions of the Federal Power Act, on the basis of operating expenses and capital costs, and not on the basis of the regulatory standards of state commissions. *Cf. F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. at 603, *supra*.

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[13]A state commission, unlike the Federal Power Commission, could be motivated by a policy of encouraging industrial development within the state by fixing a lower retail rate for industrial customers.

II. THE COURT OF APPEALS RELIED IMPROPERLY ON PRIOR DECISIONS OF THIS COURT TO SUPPORT ITS ERRONEOUS INTERPRETATION OF THE FEDERAL POWER ACT.

Having declined to give the words of jurisdictional limitation in §§205(b) and 206(a) their plain meaning and erroneously concluding that the Commission has the power to address claims of discrimination between jurisdictional and nonjurisdictional rates, the court of appeals sought to bolster its conclusion by reliance on this Court's decisions in *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 324 U.S. 635 (1945), and *Gulf States Utilities Co.* v. *F.P.C.*, 411 U.S. 747 (1973), even though the court recognized that the two cases are "distinguishable" (Petition, App. A, pp.12a, 18a). In actuality, neither case lends any weight to the court's reasoning.

As to the *Panhandle* case, the court expressed the view that the "underlying principle is one that permits the FPC to consider matters which would be completely nonjurisdictional taken by themselves, but are appropriate for consideration where germane to the meaningful execution of a jurisdictional function." (Petition, App. A, p.18a) On the contrary, the precise holding of *Panhandle* is inapposite to the issue at hand.[14] *Panhandle* dealt with a Commission investigation under §5(a) of the Natural Gas Act (15 U.S.C. §717d(a)) following a complaint that the pipeline's interstate wholesale rates were

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[14]As will be explained, *infra* at p. 19, *Panhandle* dealt with the Commission's procedures for allocating costs and not with an allegation of price discrimination.

unjust and unreasonable.[15] Since Panhandle's nonjurisdictional business was insignificant in comparison with its interstate wholesale business, the Commission did not consider it necessary to make an allocation of costs between the regulated and unregulated phases of the company's operations, as would normally be done in a proceeding involving a rate change by a regulated utility with a substantial degree of nonjurisdictional business. Instead of attempting to segregate costs and properties between the jurisdictional and nonjurisdictional classes of service, an attempt which would have been "theoretical" and "impractical" (324 U.S. at 646) in view of the unified character of the business and the fact that plant devoted exclusively to the nonjurisdictional business was less than one-sixth of one percent of the company's entire plant investment, the Commission adopted the more practical procedure of allocating all of the earnings from the entire business in excess of a 6½ percent return to the interstate

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[15]Section 5(a) of the Natural Gas Act is analogous to §206(a) of the Federal Power Act and states:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint . . . shall find that *any rate* . . . collected by any natural gas company in connection with any transportation or sale of natural gas, *subject to the jurisdiction of the Commission, . . . is unjust, unreasonable, unduly discriminatory, or preferential,* the Commission shall determine the just and reasonable rate . . . and shall fix the same by order . . . . (15 U.S.C. §717d(a)) (Emphasis added)

The meaning of "subject to the jurisdiction of the Commission" is set out in §1(b) of the Natural Gas Act:

> The provisions of this chapter shall apply . . . to the *sale in interstate commerce of natural gas for resale* for ultimate consumption . . . but shall not apply to any other . . . sale of natural gas . . . . (15 U.S.C. §717(b)) (Emphasis added)

wholesale business (324 U.S. at 642). By this method, the Commission determined that Panhandle's jurisdictional rates were excessive and should be lowered.

This Court upheld the Commission's method in light of the "exceptional circumstances" of the case (324 U.S. at 647), but stated:

> We agree that the Commission must make a separation of the regulated and unregulated business when it fixes the interstate wholesale rates of a company whose activities embrace both. *Otherwise the profits or losses, as the case may be, of the unregulated business would be assigned to the regulated business and the Commission would transgress the jurisdictional lines which Congress wrote into the Act.* (324 U.S. at 641, 642) (Emphasis added)

The Court then went on to say that §5(a), which as stated above is analogous in pertinent part to §206(a) of the Federal Power Act, "does not of course give the Commission authority to disregard the jurisdictional lines which Congress has drawn between interstate wholesale sales and direct industrial sales so as to level the profits between the two classes of business." (324 U.S. at 647)

AP&L's operations, unlike Panhandle's operations in 1945, involve a significant degree of nonjurisdictional business; accordingly, in compliance with the Commission's regulations, AP&L filed allocated cost of service studies detailing the costs associated with its jurisdictional business. The jurisdictional and nonjurisdictional aspects of AP&L's operations are easily discernible and, thus, consideration of the Company's retail rates is not germane to the execution of the Commission's jurisdictional function of establishing a just and reasonable level for the interstate wholesale rates.

In *Colorado Interstate Gas Co.* v. *F.P.C.*, 324 U.S. 581 (1945), a decision rendered on the same day as *Panhandle*, this Court again emphasized that the basic problem in a rate investigation proceeding before the Commission is to allocate to each class of business its fair share of the costs and then, if the revenue from the jurisdictional business exceeds the costs attributable to that phase of the business, the jurisdictional rates could be lowered. Significantly, with respect to the determination of the proper wholesale rate, the Court stated:

> It is of course immaterial that the revenues from the intrastate sales or the direct industrial sales may exceed their costs, since the authority to regulate those phases of the business is lacking. (324 U.S. at 588)

Further, as the concurring opinion stated, "[i]t is true that the Natural Gas Act forbids discrimination only as between regulated rates and does not forbid discrimination between the regulated and nonregulated ones." (324 U.S. at 615) The Commission's authority and jurisdiction under the Federal Power Act are no broader.

Implicit in the *Panhandle* and *Colorado Interstate* cases is the fundamental concept that the Commission must set the level of a regulated utility's interstate wholesale rates on the basis of the cost of serving the wholesale customers, as demonstrated by the allocated cost of service studies filed by the utility and subjected to administrative scrutiny. This Court's landmark decision in *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944), fully recognizes that the Commission has the responsibility in the rate reviewing area to determine the rate level necessary to recover the utility's jurisdictional costs and produce a return sufficient to maintain its financial integrity. *Cf. Bluefield Water Works and Improvement Comm'n* v. *Public Service Comm'n*, 262 U.S. 679 (1923). This obligation could

be frustrated to the detriment of AP&L and numerous other electric companies with wholesale business if the Commission were also required to set wholesale rates on the basis of determinations made by state regulatory bodies.

The court of appeals' reliance on the *Gulf States* case, *Gulf States Utilities Co.* v. *F.P.C.*, 411 U.S. 747 (1973), is equally misplaced. As does the Commission itself, AP&L recognizes that *Gulf States* stands for the proposition that the Commission should consider "in appropriate circumstances the anticompetitive effects of regulated aspects of interstate utility operations." (411 U.S. at 758) The presence or absence of "appropriate circumstances," however, depends in substantial part upon what statutory function the Commission is performing.[16]

In *Gulf States* the situation was quite different than here, since there the Commission was not exercising its limited ratemaking authority but was instead acting under §204, 16 U.S.C. §824c, which relates to the issuance of securities by a public utility.[17] This section differs radically from §§205 and 206, as subsection (f) specifically states that "[t]he provisions of this section shall not extend to a public utility organized and operating in a state under the laws of which its security issues are

[16]As the Court indicated in *Gulf States*, the Commission's scope of authority to consider antitrust allegations under one section of the Federal Power Act is not "determinative" of its scope of authority under another (411 U.S. at 757).

[17]In the Commission's §204 proceeding, certain cities had protested Gulf States' application for approval to issue the securities, alleging that the proceeds from the proposed bonds would be used to finance anticompetitive activities directed against them (411 U.S. at 751).

regulated by a State Commission." (16 U.S.C. §824c(f)) Consequently, under §204 there is no possibility of federal and state collision as there would be under §§205 and 206 if the decision below is upheld. More importantly, the Commission's scope of review under §204 is much broader than its scope of review under the ratemaking sections of the Act and was certainly intended to include antitrust standards.[18] As the Court noted specifically in *Gulf States*:

> The mandate that §204 of the Federal Power Act, 16 U.S.C. § 824c, imposes upon the Commission is a broad and impressive one. Section 204(a) empowers the commission to authorize the issue of a security by a public utility *only* "if it finds that such issue . . . is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest." This requires the Commission to inquire into and to be satisfied with the purposes of the issue and its lawfulness. And even if its "object" is lawful, the necessary inquiry is not ended, for, in addition, the object must be "compatible with the public interest." (411 U.S. at 756)

Accordingly, while the "appropriate circumstances" to consider "anticompetitive effects" are present under §204 by virtue of the broad statutory mandate within that section, the Commission's refusal to adjudicate similar claims under §§205 and 206 is not inconsistent in any way with the *Gulf States* case since the "appropriate circumstances" are not present under those sections.

[18]The Court observed that §204 of the Federal Power Act "was modeled upon §20a of the Interstate Commerce Act" which was expressly designed to give the Interstate Commerce Commission broad public interest responsibility under its authority to approve security issues (411 U.S. at 760). Congress' intent underlying §204 is, therefore, in direct opposition to its intent underlying §§205 and 206 which was to prevent the Comission from exercising ratemaking jurisdiction coextensive with that of the Interstate Commerce Commission.

In summary, neither the *Panhandle* decision, nor the *Gulf States* decision, justifies the court's restructuring of the Commission's own interpretation of its administrative responsibilities. As this Court said in *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965):

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.

Thus, reviewing courts have no authority to second-guess the Commission's accommodation of antitrust and other regulatory policies. "[S]triking the balance is for the Commission" (*Northern Lines Merger Cases*, 396 U.S. 491, 514 (1970)), and is a judgment which "the agency alone is authorized to make" (*Gulf States Utilities Co.* v. *F.P.C.*, *supra*, at 764, quoting *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943)).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should reverse the decision reached by the court of appeals, and find that the Federal Power Commission does not have the statutory authority under the Federal Power Act to adjudicate allegations of discrimination between jurisdictional interstate wholesale rates and nonjurisdictional retail rates for the sale of electricity.

Respectfully submitted,

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APPENDIX

The Federal Power Act, June 10, 1920, 41 Stat. 1063, as amended, 16 U.S.C. §§717a-825r, provides in pertinent part:

Section 201, 16 U.S.C. §824:

DECLARATION OF POLICY—APPLICATION OF PART—DEFINITIONS

(a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce,

or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

Section 205, 15 U.S.C. §824d:

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the

jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect

without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its

decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 206, 16 U.S.C. §824e:

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charges, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

The Natural Gas Act, June 21, 1938, 52 Stat. 821-33, as amended, 15 U.S.C. §§717-717w, provides in pertinent part:

Section 1(b), 15 U.S.C. §717(b):

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 5(a), 15 U.S.C. §717d(a):

(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission,

unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.